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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

NO. 76-581

MRS. CARNELL RUSS, ET AL ..... *Petitioners*

VS.

CHARLES LEE RATLIFF, ET AL ..... *Respondents*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unreported and is found in Appendix C of the Petition.

JURISDICTION

The requirements for jurisdiction are adequately set forth in the Petition.

QUESTIONS PRESENTED

I.

Whether the petition for writ of certiorari should be denied as to Respondents Mayor and City Councilmen since there was no proof of negligence of any kind against them and whether the theory of negligent entrustment was not included in the pleadings of the plaintiff or was negligence on the part of the defendants, mayor, and city councilmen, proven by the plaintiffs.

II.

Whether the Circuit Court below correctly affirmed the judgment based on the jury's verdict as to the Respondent Green.

STATEMENT OF CASE

The statement of the case is adequately set forth in the Petition.

ARGUMENT

I.

The petition for writ of certiorari should be denied as to Respondents Mayor and City Councilmen since there was no proof of negligence of any kind against them. The theory of negligent entrustment was not included in the pleadings of the plaintiff nor was negligence on the part of the defendants, Mayor and City Councilmen, proven by the plaintiffs.

Since the question of respondeat superior as well as negligence has been a part of this lawsuit from the beginning it is felt that it is beneficial to discuss both theories here.

The doctrine of respondeat superior does not apply to Civil Rights cases. There are numerous authorities to this effect. The case of *Jennings v. Davis*, 476 F. 2d 1271 (1973), at Page 1273 states:

> "The doctrine of respondeat superior is not available to impose vicarious liability upon a defendant who has no personal involvement in the alleged deprivation of plaintiff's federally-protected rights."

In order for the mayor and city councilmen to be liable there must have been personal negligence on their part since they were not present and had no personal involvement and continuing at page 1275 of the *Jennings* case we find:

> "Appellants have not alleged any affirmative conduct so their claim against the appellees obviously is grounded upon nonfeasance. But no board member or the chief is alleged to have been present at this incident

or to have had the duty, opportunity, or the ability to intervene in order to prevent Noffke's alleged unreasonable search and seizure of Mrs. Jennings. And to extend the general duty of these appellees to prudently select, educate and supervise police department employees to an isolated, spontaneous incident such as this would be beyond reason."

To the same effect is *Jordan v. Kelly*, 223 F. Supp. 731 (1963) wherein we find the following at page 737:

"The rule is different however, with respect to the chief of police of a municipal police department. Even though he may be charged with the duty of selecting the members of the force, he is not responsible for their acts unless he has directed such acts to be done, or has personally cooperated in the offense, for each police officer, is, like himself, a public servant."

It has been held that even the failure to properly train, restrain, and supervise would not subject the superior officials to liability absent personal involvement. See *Sanberg v. Dailey*, 306 F. Supp. 277 (1969), at page 278 where the Court states:

"As to the individual named defendants, the complaint alleges that they were charged with the control and supervision of the John Doe officers and knew, or should have known, of the 'wrongs' committed by them. Further it charges that these named defendants, with intentional or negligent disregard of plaintiff's constitutional rights, committed one or more of a number of acts or omissions. These include failure to adequately supervise and restrain these policemen, permitting their use of lethal weapons and excessive

force, and failure to use adequate warning to plaintiff, Sanberg.

The doctrine of respondeat superior has no place under the Civil Rights Statutes, for personal involvement is contemplated. Premised on personal culpability, these statutes are aimed at those who subject others to a deprivation of their constitutional rights, rather than at the state or city which employs them or the official with ultimate authority over them in the governmental hierarchy.

Of course, supervisory personnel may be liable in damages if they personally participate in or direct the infliction of injury. Plaintiff does not charge, however, that the named defendants struck the blows, nor does he allege that they ordered the attack on plaintiff. And the courts have uniformly held that police supervisory personnel are not liable for damages to one injured by police misconduct absent direct personal participation."

This has been held to be true even where the allegations were that the mayor knew of the police officer's dangerous propensities but did not attempt to halt his course of conduct. See *Patrum v. Martin*, 292 F. Supp. 370 (1968) where the Court held:

"That the mayor knew of the police officer's dangerous propensities but did not attempt to halt his course of conduct, and in paragraph 11 that the wrongful acts were committed with the knowledge and consent of defendants, City of Greenburg, and George Huddleston, Mayor, or were thereafter approved by said defendants. These allegations, containing no definite assertion of the mayor's, personal participation in the

wrongful acts, are not sufficient to render him liable under the Civil Rights Acts."

It can readily be seen from the above authority that it was the duty of the trial court to grant the defendant, Mayor, and defendants, City Councilmen, their motion for a directed verdict since they had no liability under the Civil Rights Acts involved in this litigation.

In the very recent case of *Rizzo v. Goode*, 96 S. Ct. 598; 46 L. Ed. 2d 561 (January 21, 1976), the U. S. Supreme Court held that no complaint could be filed against the mayor or high ranking police officials unless they have been directly and personally responsible for the brutality.

Admittedly the *Rizzo* case had to do with the equitable relief of an injunction, but it is earnestly submitted that this case also impliedly, at least, holds that there would have to be personal involvement before the mayor and city council could be held liable for money damages. As a matter of fact, in the *Rizzo* case, the mayor, the city managing director, and the police commissioner were charged with conduct ranging from express authorization or encouragement of mistreatment to failure to act in a manner so as to assure that it would not recur in the future. Since the Supreme Court has held that this kind of action could not be prevented by an injunction against individuals not personally involved, it is submitted that it necessarily follows that said officials could not be held liable for money damages where they were not personally involved.

The theory of negligent entrustment was not included in the pleadings of the plaintiffs, nor was negligence on the part of the defendants mayor and city councilmen, proven by the plaintiffs.

Although the plaintiffs did allege negligence, they never did specifically plead the theory of negligent entrustment either in their original complaint nor in their amended complaint. As a matter of fact, the plaintiffs petition to amend the complaint shortly before the trial stated it was so they could include the Eighth Amendment to the Constitution of the United States and to pendent jurisdiction to include an allegation of a violation of Section 27-906 et seq. of the Statutes of Arkansas, commonly referred to as the Wrongful Death Act pursuant to Arkansas State law. The order of the trial court dated September 17, 1975, authorizing plaintiffs to amend their complaint, makes the findings that the above mentioned was the reason for the amendment. Therefore, the theory of negligent entrustment was never a part of this lawsuit.

In any case, the plaintiffs did not meet their burden of proof of negligence on the part of defendants, Mayor and City Councilmen, in any manner.

The plaintiffs' proof does not meet their own five requirements for the defendants to be held liable for negligent entrustment. One being proof *that the entrustee was incompetent, inexperienced or reckless.*

There was no proof in the record at all indicating that Ratliff was incompetent, inexperienced or reckless, unless the shooting involved in this lawsuit is so considered, and the Mayor immediately suspended him from duty when the incident involved in this lawsuit occurred and he (Ratliff), never again served as a policeman for the City of Star City. As stated, the only thing that could be construed as evidence at the time the trial court granted the motion for a directed verdict, was the one shooting incident itself. On the other hand, the record before the court indicated that the said

Ratliff had had six months of military police training, and that he had had experience as a military policeman. In other words, he had had training in the use of firearms and was not inexperienced and was not incompetent or reckless so far as the defendants, Mayor and Councilmen, knew.

The second test cited by plaintiffs is that the entrustor knew, or *had reason to know of the entrustee's condition or proclivities*. Again, there was no proof whatsoever in the record that defendants, Mayor and City Councilmen, knew, or had reason to know of anything of Ratliff's condition which would have put them on notice that this type of thing might have happened.

Appellants seem to be saying that they have created certain inferences and certain implications, and that defendants should have gone forward with the proof that these inferences and implications were not true. Of course, the law is that the plaintiffs had the burden of proving their inferences and implications which they did not do.

At the close of plaintiffs' case, at which time the court directed a verdict for defendants, Mayor and City Councilmen, the Appellants had presented only three witnesses, namely, Bobby McGriff, Marvin Thompson, and William Thomasson, for the purpose of proving that defendant, Mayor, and defendants, City Councilmen, had notice of defendant, Ratliff's propensities for violence. When their testimony is reviewed it is obvious that in fact, they had not given any notice of anything reflecting on defendant, Ratliff, to defendants, Mayor and City Councilmen. First let us examine the testimony of Bobby McGriff, the applicable part being found in Appendix, Volume II, page 388:

Line 19: "A. I told Mr. Frizzell that some — that if they don't rule Mr. Ratliff on police — in the police department that he was going to hurt somebody."

Page 391, line 4: "Q. Now, you told the Mayor that he had tried to use a gun on you? A. I could not get in to see the Mayor except the date of the trial, and I tried to talk to him. And he, wouldn't listen to me — and, that's when I appealed it to the Circuit Court. Q. But you didn't tell Mr. Frizzell that he had tried to use a pistol on you, or threatened you? A. I told Mr. Frizzell exactly what I said in this court — that I told him that the man was going to hurt somebody if they did not remove him from the police department."

Page 393, line 19: "Q. At this time, I believe I recall that you told me that you would have my badge, and you was going to the Mayor and get it at that time? A. Yes, sir. I went to see the Mayor, but I didn't get in to see him."

It is seen from the above testimony that Mr. McGriff has not told anyone of anything that would have put the Mayor or City Councilmen on notice. He specifically states that he did not get to see the Mayor, and was convicted by the Mayor, in Mayor's court, on the charges that had been filed against him. He makes a general statement of what he says he told Mr. Frizzell but he does not give any reason for the statement. Nor does he testify as to anything that he told Mr. Frizzell that would have explained, or justified, his opinion that Mr. Ratliff was going to hurt somebody. It is of particular interest that he did not tell Mr. Frizzell, by his own testimony, that Mr. Ratliff was going to injure someone with his pistol, or that he had pistol whipped anyone.

The testimony of Marvin Thompson, that the appellants had relied on so heavily did not even involve officer Ratliff, but instead another previous officer by the name of Roy Hawkins which the City Counsel had relieved of his duties upon the complaint of Mr. Thompson and other citizens.

We find Mr. Thompson's testimony in Volume II of the Appendix, the applicable part being at page 396, line 20:

"Q. And, your testimony now today, is, that you never did complain to the Star City Council about the conduct of Mr. Ratliff?

A. No, sir. Not about Mr. Ratliff."

Page 400, Line 17: "Q. Mr. Thompson, I think the incident that you — or that Mr. Meyerson was referring — referred to an officer who use to work for the City of Star City; is it not?

A. Yes, sir.

Q. And also — the man was Mr. Lloyd Hawkins; is that not true?

A. Yes, sir.

Q. Is this not the individual that you mentioned that the City let go, or at least he ceased to be a policeman for Star City?

A. Yes, sir. But I couldn't remember."

Witness, William Thomasson, has been charged with DWI and resisting arrest and had been found guilty by defendant, Mayor Lynn Thomasson, who was acting as judge of the Mayor's court. But even he testified that he never told the Mayor anything about defendant, Ratliff, except when he testified in defense of the charges against

him in the Mayor's court. In other words, he was only testifying as a defendant in a misdemeanor case and was not giving the Mayor notice of anything out of the ordinary. See page 407 of the Appendix, Volume II, line 24:

"Q. And, other than the fact that you were testifying in this criminal case of DWI — resisting arrest, other than the fact that you was telling the Mayor as judge, your side of the story, or your defense, other than that, you didn't lodge any formal complaint with him against Mr. Ratliff did you?

A. No, I didn't."

It is obvious from the above testimony, that there was not any evidence of neglect, or other negligence on the part of defendants, Mayor Lynn Thomasson, and members of the City Council. The burden was on the plaintiffs to prove the facts of actual knowledge and acquiescence. See *Bracey v. Grenoble*, 494 F. 2d 566 (1974) at page 574.

II.

The Circuit Court below correctly affirmed the judgment based on the jury's verdict as to the Respondent Green.

Petitioners contend that since the Circuit Court below reversed as to the Respondent Ratliff, it would be unjust and legally erroneous to allow the jury verdict to stand as to the Respondent Green. No cases are cited in support of this argument and the respondents are aware of none.

It is submitted by the Respondent Green that no considerations are presented herein which alter the constitutional policy favoring the finality of jury verdicts. This

Court stated in *Atlantic & Gulf Stevedore v. Ellerman Lines*, 369 U.S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962):

> "But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "

CONCLUSION

It is earnestly submitted that the petition for writ of certiorari should be denied since the Eighth Circuit Court of Appeals has committed no error.

Respectfully submitted,

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